No. 16274

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUTHORIZED SUPPLY COMPANY OF ARIZONA, a Corporation,
Appellant,

vs.

SWIFT & COMPANY, a Corporation, ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellees.

ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellants,

vs.

SWIFT & COMPANY, a Corporation,
Appellee.

PETITION FOR REHEARING

DARNELL, HOLESAPPLE, MCFALL & SPAID
Attorneys for Appellees
Arizona York Refrigeration Company,
and Southern Arizona York Refrigeration
Company
410 Valley National Building
Tucson, Arizona

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STATEMENT OF GROUNDS FOR REHEARING

1. The Court of Appeals erred in permitting the assertion by appellee Swift & Company of a wholly new theory of the case on a Petition for Rehearing, and in entering its Opinion on Rehearing adopting said theory thereby reversing the prior Opinion of this Court.

2. The Court of Appeals erred in denying appellees Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company the right to recover over against appellant Authorized Supply Company of Arizona, and in entering judgment reversing the trial court accordingly.

ARGUMENT

Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit does not make specific reference to the right of a party to file a petition for rehearing as to a "Judgment" entered in an opinion on a rehearing once granted. The Rule does not deny the right to so petition, and it is believed that this Court has full power to grant a second rehearing. The Supreme Court of Arizona, for example, recognized its "inherent power" so to do in *Lane v. Mathews,* 75 Ariz. 1, 251 P. 2d 303.

It is submitted by appellees Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company ("York") that by virtue of its opinion on rehearing, dated April 21, 1960, the Court has accomplished serious injustice to these appellees York, while attempting to do "justice" for appellee Swift & Company. It is further submitted that the Court's action is clearly contrary to binding precedent in this the Ninth Circuit, and in other circuits of the United States Court of Appeals, as well as in other appellate courts throughout the country.

The obvious effect of the opinion on rehearing is to cause all damage and loss claimed by Swift & Company to fall solely on the appellees York, innocent purchasers from appellant Authorized Supply Company of Arizona of inherently defective refrigeration coils, said York companies having no legal right to assert any remedy whatever against the real wrongdoer, Bush Manufacturing Company; for it is only through its vendee, Authorized Supply Company, that a remedy could be asserted over against it.

"In the interest of justice" the Court has set aside a firmly established principle of appellate jurisdiction and has given Swift & Company the benefit of a wholly new lawsuit and favorable judgment; at the same time the Court has penalized appellees York with a legal defense which Swift has from the beginning quarreled with and attempted to overcome, as unreasonable and unfair. If the "interest of justice" is to be the paramount consideration, it is respectfully submitted that this Court should have affirmed the judgment of the District Court in its entirety, as it did permit the doing of justice to *all* parties by giving to the distributor, Authorized Supply Company, the opportunity to assert the ultimate remedy against the wrongdoer Bush *with whom it was in privity.* Ironically enough, the Swift & Company Petition for Rehearing as well as its Answering Brief on Rehearing sought only that the Judgment of the District Court be affirmed as it was written, to wit, in its entirety.

The decision on rehearing most frankly announces that Swift " . . . has practically, if not completely, abandoned the theory upon which the case was presented to us"; that "no such contention (that the Swift-York transaction was a contract for work, labor and materials) appears in such appellees' brief filed prior to the original hearing, nor was it mentioned by such appellee on oral argument"; and that ". . . in the interest of justice we should consider appellee Swift & Company's new contention on this rehearing regardless of such appellee's failure to present such contention on the original appeal."

This very Circuit in *Mitchell v. Greenough,* 100 F. 2d 1006, cert. den. 306 U. S. 659, 59 S. Ct. 788, 83 L.Ed. 1056, decided in 1939, (cited by York on page 1 of its Brief on Rehearing) turned down a plaintiff's con-

tention that a three year Washington statute of limitations, within which period of time the action had been filed, was controlling, saying, "A party cannot on petition for a rehearing shift his position". Is there not an equally valid claim that the "interest of justice" called for different treatment for that plaintiff? In the *Mitchell* decision the Court cited opinions from the Eighth, First and Second Circuits as ample precedent for the ruling. A call to the "interest of justice" could just as well have been made in *Marion Steam Shovel Co. v. Bertino,* 8 Cir., 82 F.2d 945, wherein it was held that a party could not for the first time on rehearing make a contention of non-negligence of an agent for whom the party was alleged liable, saying "These questions were waived on the original hearing and must be treated as abandoned." The Eighth Circuit also recognized that an issue which was not brought to the attention of the trial court was not available on appeal. Equally is this rule applicable in the case now before this Court. In its Brief on Rehearing appellees York cited *Otoe County Nat'l. Bank v. Delaney,* 88 F.2d 238, which in turn cited some eighteen cases from the United States Courts of Appeals, with emphasis on the Eighth Circuit and the United States Supreme Court, affirming the well-nigh universal rule that questions not argued in the complaining party's brief will not be considered on his petition for rehearing. Typical of the more recent holdings in the State courts is *Acme-Goodrich, Inc. v. Neal,* 158 N.E. 2d 299, to the effect that where a plaintiff had proceeded through the trial court and the appellate court on the theory that its action was filed under statutory provisions to review a judgment, it could not on a petition for rehearing in the appellate court successfully assert that it had mis-designated the procedure and that it was actually maintaining an application to vacate and

set aside a void judgment. These decisions are certainly not without adequate reason.

It is submitted that in every one of the above-mentioned and the other innumerable cases decided in the several Circuits and in the appellate courts of the various states denying a party the right on a petition for rehearing to assert a new theory (one not presented at trial or on appeal), a worth while argument existed that the "interest of justice" called for such reconsideration.

The danger in succumbing in the face of a call to the "interest of justice" is that it leads to rulings predicated in large measure upon how attractive the "justice" feature of a particular case may appear to the judges before whom the case is presented. As an inevitable end result, the decisions rendered on that basis constitute in greater or lesser measure the writing of individual law for individual cases. Appellees York submit that it is a great deal more important in the administration of justice that controlling principle and precedent be followed (in this instance, that cases should be reviewed on the issues conceived by the contending parties in the trial court and the questions presented to and determined by the trial Judge) than that a particular party in a particular case be relieved of the consequences of his own freely chosen but later deemed incorrect theory of his case. If the responsibility is to be shifted from the parties to the courts to choose and assert the best or the most persuasive theory or remedy in each case, then the rules of orderly procedure are erased and the door is flung open to destruction of that stability and certainty which is in no small degree the essence of the Anglo-American judicial process.

Practical ramifications affecting much future litigation are suggested by the Court's Opinion on Rehearing sanctioning Swift's sudden reversal of position. The Opinion may well signify that a duty is now imposed upon a defendant in every case to anticipate and prepare for trial on every possible theory which a plaintiff might ultimately assert, even on appeal, no matter how clearly a single theory of recovery may be stated in the complaint. One might also not unreasonably contend that the over-all sense of the Opinion points to the existence of an additional obligation upon a party in a law suit to fill in gaps in theory or evidence in his adversary's case by pleading or testimony at trial (thereby, perhaps, engineering his own defeat) in order to avoid the possibility of a non-recourse reversal on appeal or rehearing.

The Court is urged to carefully once again read the Amended Complaint on which the instant dispute proceeded to trial, and then with equal care review the Findings of Fact and Conclusions of Law entered by the Honorable District Judge. (Transcript of Record pages 3-6 and 28-35). Emphasis was placed on these critical instruments at pages 3 and 4 of Yorks' Brief on Rehearing. The Court's Opinion on Rehearing speaks *only* of express warranties in supporting Swift & Company's new found theory, but ignores the interlocking and inseparable claim of Swift in both Counts I and II of the Amended Complaint and the Findings and Conclusions of the District Court of implied warranties having their existence only in the Sales Act itself. If, as the Court says, ". . . the relevant findings of fact of the trial court are amply supported by the evidence" and "We find no error in the conclusions of law reached by the District Court", how can any conclusion be reached but that Swift's

case was pleaded, tried *and decided* in the District Court *only* as a claim for damages for breach of express *and* implied warranties of a *contract for the sale of goods?*

It is submitted in all candor that the Court had two alternative choices on rehearing, either one of which would have accomplished a better legal or equitable result, depending upon where the primary emphasis should be placed, than has now occured: Stand firm on the original opinion of October 12, 1959 on the basis that it is too late for Swift to shift its entire position on rehearing and that it, rather than the Court or another party should accept the responsibility for the consequences of its own choice of legal theory and remedy; or, "in the interest of justice" to *all* parties, enter an opinion affirming the whole judgment of the District Court on the basis of the findings of fact and conclusions of law entered by it. The former of these two choices has the merit of placing responsibility for whatever "injustice" may fairly be claimed on the original plaintiff Swift & Company where it belongs. The advantage of the latter of the two choices may lie in the field of equity, as it would permit Authorized Supply Company to move against the manufacturer of the faulty merchandise.

CONCLUSION

Appellees York pray the Court to grant the within Petition for Rehearing and after rehearing enter its Opinion and Judgment either in full conformity with its Opinion of October 12, 1957, or reversing its Opinion of April 21, 1960 on Rehearing wherein these appellees were denied the right to recover over against

appellant Authorized Supply Company of Arizona.

It is requested, in accordance with Rule 23 of this Court, that the case be reheard en banc.

Respectfully submitted,

DARNELL, HOLESAPPLE, McFALL & SPAID

By _____

Attorneys for Appellees

Arizona York Refrigeration Company, and Southern Arizona York Refrigeration Company
410 Valley National Building
Tucson, Arizona

CERTIFICATION

RICHARD C. BRINEY, one of the attorneys for Appellees Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company, hereby certifies that the foregoing Petition of Appellees York for Rehearing is, in his judgment well founded and is not interposed for delay.

Dated the 17th day of May, 1960.

Richard C. Briney

Attorney for Appellees York

Three copies of the within Petition of Appellees York for Rehearing were

received this 17 day of May, 1960.

BOYLE, BILBY, THOMPSON
& SHOENHAIR

By Richard M. Bilby

Attorneys for Appellant

Swift & Company
Ninth Floor
Valley National Building

MAY, LESHER & DEES

By Milton S. Kupp

Attorneys for Appellant

Authorized Supply Company of Arizona
706 Arizona Land Title Building
Tucson, Arizona

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